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Global Justice Academy Blog

Global Justice Academy, University of Edinburgh

Human Rights Act Repeal and Devolution: Quick Points and Further Resources on Scotland and Northern Ireland

Posted on **May 13, 2015** by **Harriet Cornell**

Can the UK's Human Rights Act be repealed? What would the process need? Is it even possible? What are the legal implications?

Christine Bell, Professor of Constitutional Law at Edinburgh Law School, Assistant Principal Global Justice and Director of the Global Justice Academy, offers this review of the current debate on repealing the Human Rights Act, and points readers to other available resources.

In the past few days repeal of the Human Rights Act, and in particular its devolution implications have attracted a lot of attention. Today, a new report is launched from a legal expert seminar in April 2015, on the legal implications of repeal of the human rights act (see below). The report provides the full chapter and verse, but here are a few quick points on the devolution implications, with further more detailed and reasoned resources below.

1. The Human Rights Act is **Westminster legislation** applying throughout the UK, if it is repealed in its entirety it will be repealed for the whole of the UK without more legislation.
2. The **Scotland Act** gives powers to the Scottish Parliament, so long as they comply with the ECHR (among other things). This would not change with repeal of the Human Rights Act alone.
3. However, **human rights are also partially devolved** (the Scottish Parliament, for example, has set up a Scottish Human Rights Commission), and so any unilateral repeal of the Human Rights Act by Westminster would violate the **Sewell Convention**,

whereby the Westminster government will 'not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament'. Similar understandings apply through memoranda of understandings with each of the devolved legislatures in the UK.

4. To further complicate matters, the **Smith Commission** proposals and draft clauses propose putting the Sewell Convention on a legislative footing, rather than merely rely on Convention. So the issue raises the prospect of a very real clash between the Conservative Party's commitments to revise and reduce the role of the European Convention on Human Rights in UK Law, and its commitments to the Scottish electorate to implement 'the vow'. And, one could surmise, the real possibility of a clash between the Scottish and Westminster Parliament.
5. The repeal of the Human Rights Act raises **even more problems in Northern Ireland**, where a similar commitment not to legislate against the wishes of the NI Government (a complicated 'shared' Unionist and Nationalist government) exists.

In Northern Ireland human rights are even further devolved than in Scotland, and the Human Rights Act is explicitly mentioned in the Northern Ireland Act 1998, meaning that it would have to be immediately amended if the Human Rights Act was repealed. In Northern Ireland, however, the commitment to the Human Rights Act mechanism was also put in detail into the Belfast or Good Friday Agreement which forms the constitutional DNA of the Northern Ireland Act 1998. The UK government as part of the peace agreement also signed a **legally binding international treaty with the Republic of Ireland** government, where both committed to implement the Agreement commitments that required action on each government's part. The Republic of Ireland as part its implementation of Agreement and Treaty, changed its Constitution removing historic claims to jurisdiction over Northern Ireland, and incorporated the ECHR into its law, as part of the reciprocal agreement to 'match' human rights provisions in the UK (in part to assuage Unionist concerns).

Repealing the Human Rights Act unilaterally would put the UK in violation of the letter of the Good Friday Agreement, and its international treaty obligations to Ireland. This would have international reputational consequences and consequences for the reciprocity on which the Treaty depends. However, it would also be understood within Northern Ireland as a violation of both letter and spirit of the Belfast / Good Friday Agreement, and potentially a signal that the Government were no longer committed to the Agreement and that all its provisions were up for grabs. This Agreement also was subject to a referendum in both Northern Ireland and the Republic of Ireland with both parts having to consent for the Agreement to be implemented. The referendum enabled the Agreement to have widespread legitimacy, but more notably by taking place in both parts of the island of Ireland answered historic Republican claims to be using violence to secure the 'right to self-determination' of the Irish people. It was also necessary to changing the Irish Constitution. So any unilateral move away from its commitments carries major democratic legitimacy and bad faith consequences, with deep and problematic historical resonances.

It should also be noted, that while the Human Rights Act is now described throughout Conservative documents as 'Labour's Human Rights Act', in fact there was an **explicit**

‘bi-partisan’ approach agreed across the two main parties to support the peace process and Agreement in Northern Ireland, which was and remains crucial to its success. That UK government support rooted in the bi-partisan commitment has up until now carried clearly through successive governments and changes in power. Repeal of the Human Rights Act in Northern Ireland would constitute a remarkable and unfortunate break with the bi-partisan approach.

6. So to put it shortly, **repeal of the Human Rights Act would require the consent of the devolved regions and the Republic of Ireland**. Even if such consent was forthcoming, moving away from the Human Rights Act could be considered a breach of the Belfast or Good Friday Agreement by the ‘people of the island of Ireland, North and South’, who formally ratified the Agreement with its explicit commitment to the Human Rights Act mechanism, in a referendum.

Useful resources:

See new report drawing from an expert seminar on the issue:

- The Legal Implications of a Repeal of the Human Rights Act 1998 and Withdrawal from the European Convention on Human Rights, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605487
- 2010 (but still good and relevant) in depth report from JUSTICE, ‘Devolution and Human Rights’, at <http://justice.org.uk/devolution-human-rights/>

See also blogs / positions from:

- Committee on the Administration of Justice. Tory Plan to Repeal Human Rights Act in NI would constitute flagrant breach of GFA, at <http://www.caj.org.uk/contents/1293>
- Colm O’Cinneide. Human Rights, Devolution and the Constrained Authority of the Westminster Parliament, at <http://ukconstitutionallaw.org/2013/03/04/colm-ocinneide-human-rights-devolution-and-the-constrained-authority-of-the-westminster-parliament/>
- Aileen McHarg. Will Devolution Scupper Conservative Plans for a ‘British’ Bill of Rights?, at <http://ukhumanrightsblog.com/2014/10/02/will-devolution-scupper-conservative-plans-for-a-british-bill-of-rights/>
- Andrew Ticknell. Scotland and Human Rights Act Abolition, at <http://lallandspeatworrier.blogspot.co.uk/>

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